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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

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7 HAKAN YUCESOY,

8 Plaintiff,

9 v.

10 UBER TECHNOLOGIES, INC., et al.,

11 Defendants.

Case No. 15-cv-00262-EMC

**CORRECTED ORDER GRANTING IN
PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS**

Docket No. 109

12 **I. INTRODUCTION**

13 Plaintiffs are former and current drivers who drove for Defendant Uber in Massachusetts
14 starting in 2012. Docket No. 86 (Second Amended Complaint) (SAC) at ¶¶ 5-9. In June 2014,
15 Plaintiffs Hakan Yucesoy and Abdi Mahammed filed this putative class action lawsuit, alleging
16 that Uber and individual Defendants Travis Kalanick and Ryan Graves (collectively Defendants)
17 violated numerous provisions of Massachusetts law, including misclassifying drivers as
18 independent contractors and failing to remit gratuities to drivers. *See* Docket No. 1-1. After
19 Plaintiffs filed a First Amended Complaint (FAC), Defendants moved to dismiss all but the
20 misclassification claims for failure to state a claim. The Court granted in part and denied in part,
21 ruling that “[w]ith the exception of the Tips Law, tortious interference with advantageous
22 relations, and *quantum meruit* claims against Uber, all of Plaintiffs remaining challenged claims
23 are insufficiently pleaded.” Docket No. 69 at 18 (Motion to Dismiss Order) (MTD Order). The
24 Court also dismissed the Tips Law claim against the individual defendants, finding that there were
25 insufficient allegations to demonstrate that either individual defendant was an employer as defined
26 by the Tips Law. *Id.* at 17.

27 Plaintiffs filed a Second Amended Complaint on July 29, 2015, adding in named Plaintiffs
28 Mokhtar Talha, Brian Morris, and Pedro Sanchez. The Second Amended Complaint alleges the

same seven causes of action as the FAC, namely: (1) Independent Contractor Misclassification; (2) Violation of the Massachusetts Tips Law; (3) Tortious Interference with Contractual and/or Advantageous Relations; (4) Unjust Enrichment/*Quantum Meruit*; (5) Breach of Contract; (6) Violation of the Massachusetts Minimum Wage Law; and (7) Violation of the Massachusetts Overtime Law. The Second Amended Complaint alleges that the individual defendants are liable only with respect to Counts 1 and 2.

Uber now moves to dismiss Counts 2-7 for failure to state a claim. Docket No. 109 (Mot.). The individual defendants move for dismissal of Counts 1-2 for failure to plead sufficient facts to demonstrate a plausible case for individual liability. Defendants' motion to dismiss came on for hearing before the Court on November 4, 2015. For the reasons set forth below, the Court **GRANTS** the motion to dismiss in part and **DENIES** in part.

II. DISCUSSION

Defendants move for a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) allows for dismissal based on a failure to state a claim for relief. A motion to dismiss based on this rule essentially challenges the legal sufficiency of the claims alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering a Rule 12(b)(6) motion, a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party, although “conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to state a claim of relief that is plausible on its face.’” *Weber v. Dep’t of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 556. However, “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted unlawfully.” *Iqbal*, 556 U.S. at 678.

1 A. Massachusetts Tips Law

2 Plaintiff's complaint primarily alleges that "Defendants have violated the Massachusetts
3 Tips Law, Mass. Gen. L. c. 149 § 152A, by failing to remit to drivers the total proceeds of
4 gratuities that Defendants have informed customers are included in Uber's price for car service."
5 SAC at Count II. As Plaintiffs explain in the Second Amended Complaint, "Uber has stated to
6 customers, on its website and in marketing materials, that a gratuity is included in the total cost of
7 the car service and that there is no need to tip the driver." *Id.* at ¶ 17. "However, Uber drivers
8 have not received the total proceeds of this gratuity," as Uber "retain[s] a portion of this tip,
9 gratuity, or service charge for itself." *Id.* at ¶¶ 19-20.

10 Defendants contend that the Tips claim is subject to Rule 9(b)'s heightened pleading
11 standard because it sounds in fraud. Mot. at 7. The Court agrees. While this is not a traditional
12 fraud claim, Plaintiffs nevertheless allege that Defendants misrepresented to consumers that
13 gratuity is included in the price of its service. *See* SAC at ¶¶ 3, 17, 18. However, Plaintiffs'
14 complaint lacks the details required by Rule 9(b), including, *e.g.*, allegations as to what the
15 specific misrepresentations were, where they were made, and when they were made. For this
16 reason, the Court dismisses this claim with leave to amend.

17 B. Preemption of Common Law Claims

18 Defendants contend that Plaintiffs' common law causes of action for tortious interference,
19 unjust enrichment/*quantum meruit*, and breach of contract each fail because they are superseded
20 by the Massachusetts Tips Law. Mot. at 10. Under Massachusetts law, "it is well established that
21 an existing common law remedy is not to be taken away by statute unless by direct enactment or
22 necessary implication." *Lipsitt v. Plaud*, 466 Mass. 240, 247 (2013) (citations omitted). In *Lipsitt*,
23 the Supreme Judicial Court of Massachusetts held that implied preclusion of common law claims
24 can be found where "the legislature creates a new right or duty that is wholly the creature of
25 statute and does not exist at common law." 466 Mass. 240, 247 (2013). In contrast, where a
26 common law claim was cognizable *prior* to the creation of a statutory right of action, an express
27 intent to preclude the common law claim is required. *Id.* at 248.

28 As an example of a right or duty that is wholly a creature of statute, the Supreme Judicial

1 Court cited *Mansfield v. Pitney Bowes, Inc.*, to find that:

2 “cases involving the Tips Act . . . are situations where an employee
3 would have no recognized cause of action but for the statutes’
4 imposition of obligations on employers.” General Laws c. 149, §
5 152A, requires that service charges collected from customers only
6 be remitted to certain categories of employees. Because the “right
7 to have service charges imposed by a service employer distributed
only to certain categories of employees is created by G.L. c. 149, §
152A, and did not exist at common law,” common-law claims
predicated on a violation of G.L. c. 149, § 152A, are “mere
surplusage because they needlessly duplicate the remedies available
under the statute.”

8 *Id.* at 249 n.11 (quoting *Mansfield v. Pitney Bowes, Inc.*, Civil Action No. 12-10131-DJC, 2013
9 WL 947191, at *3 (D. Mass. Mar. 12, 2013)). However, the Supreme Judicial Court went on to
10 state that it was “not confronted with and do[es] not decide the scope of the above cited statutes’
11 implied preclusion of common-law claims” *Id.*

12 Thus, at issue here is whether Plaintiffs’ claims are wholly based on a right created under
13 statute which have not been previously recognized at common law. The Court finds that
14 Plaintiffs’ common law claims are not based on the “right to have service charges imposed by a
15 service employer distributed only to certain categories of employees,” a right that the Supreme
16 Judicial Court found existed only by statute. *Id.* Instead, Plaintiffs’ claims are based on
17 Defendants’ alleged failure to remit the full amount of the tip that Defendants allegedly informed
18 consumers would be provided to Plaintiffs; their claims are grounded in claims for tortious
19 interference, *quantum meruit*, and breach of contract (third party beneficiary), claims that existed
20 in common law independent of the statute. In contrast, cases cited by Uber concerned improper
21 pooling of tips for distribution to persons who were not service employees based on the statute
22 (*i.e.*, persons outside the “certain categories of employees” who may receive tips per Section
23 152A(b)-(c)). *See Cormier v. Landry’s, Inc.*, Civil Action No. 13-11822-NMG, 2013 U.S. Dist.
24 LEXIS 167340, at *13 (D. Mass. Nov. 22, 2013) (dismissing common law claim based on
25 improper tip pooling); *DePina v. Marriot Int’l, Inc.*, No. SUCV200305434G, 2009 WL 8554874,
26 at *13-14 (Mass. Super. Ct. July 28, 2009) (dismissing common law claims based on improper
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1 administration of gratuity pool).¹ Because Plaintiffs' claims are based on a separate right of
2 recovery that was not necessarily created under statute, the Court finds that the common law
3 claims are not superseded. *E.g., Williamson v. DT Mgmt.*, 02-1827-D, 2004 Mass. Super. LEXIS
4 141, at *42-45 (Mar. 10, 2014); *Meshna v. Scrivanos*, Docket No. 2011-01849-BLS1, 2011 Mass.
5 Super. LEXIS 334, at *13 (Dec. 21, 2011).

6 C. Tortious Interference with Advantageous Relations

7 Plaintiffs allege that Uber tortuously interfered with the advantageous relations that exist
8 between the drivers and the customers by "informing its customers that there is no need to tip their
9 drivers." SAC at Count III. While this claim is not superseded by statute, it is also dependent on
10 the alleged misrepresentation that Uber informed customers that tip was included. Because
11 Plaintiffs have failed to satisfy Rule 9(b)'s heightened pleading standard with respect to the
12 alleged misrepresentation, the Court will dismiss this claim with leave to amend.

13 D. Unjust Enrichment and *Quantum Meruit*

14 Plaintiffs' fourth cause of action is for unjust enrichment. Specifically, Plaintiffs allege
15 that Uber has been unjustly enriched by retaining a portion of the gratuities intended for drivers,
16 and that Plaintiff class members are entitled to restitution of their full share of these retained tips.
17 SAC at Count IV. Uber contends this claim cannot be brought when there is an express contract
18 between Uber and the drivers governing Uber's payment of fares to drivers. Mot. at 12.

19 The Court previously declined to dismiss this claim because Plaintiffs did not allege the
20 existence of an express contract that governs Uber's payment of fares or gratuities. MTD Order at
21 11. The Court found that judicial notice of alleged contracts was not appropriate at this stage of
22 the proceedings. *Id.*

23 Uber again contends that the unjust enrichment claim should be dismissed because there is
24 an express contract governing the terms of payment to drivers, and seeks to have the Court take
25 judicial notice of every contract that have been issued to drivers and/or transportation providers

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27 ¹ Uber also cites *Masiello v. Marriot International, Inc.*, but there the court's decision was
28 not based on preemption, but a finding that because the Tips Law claim failed, the common law
claims dependent on the Tips Law violation likewise failed. Civil Action No. 08-4036-BLS1,
2011 WL 1842293 (Mass. Superior Ct. Apr. 8, 2011).

1 from August 16, 2009 to the present. Mot. at 12; Docket No. 109-1 (RJN) at 1. As Plaintiffs
2 again oppose Uber's request for judicial notice of the contracts, the Court will deny both the
3 request for judicial notice and the motion to dismiss the *quantum meruit* claim. However,
4 Plaintiffs' counsel is reminded of their obligations under Rule 11 moving forward, especially in
5 light of this Court's ruling in *O'Connor* that there are contracts which specifically governed how
6 fares will be divvied up between drivers and Uber, and that this claim may well turn on the
7 evidence theory. *See O'Connor v. Uber Techs., Inc.*, No. C-13-3826-EMC, 2013 WL 6354534, at
8 *13 (N.D. Cal. Dec. 5, 2013).

9 E. Breach of Contract

10 Plaintiffs' fifth cause of action alleges breach of contract, asserting a third-party
11 beneficiary claim. While Plaintiffs have added one additional allegation explaining their theory
12 for why drivers may be a third-party beneficiary, Plaintiffs have added no specific facts as to why
13 their theory is plausible. For example, there is no information as to what contract Plaintiffs rely
14 upon, what specific representations were incorporated, or how these representations were
15 incorporated into the contract so as to give rise to third party beneficiary status.² The Court
16 dismisses this claim with leave to amend.

17 F. Minimum Wage and Overtime Law Claims

18 Plaintiffs' final two claims allege that Uber failed to pay drivers required minimum wages
19 or overtime under Massachusetts law. With respect to the minimum wage claim, Plaintiffs add
20 only a single allegation that "Plaintiff Morris calculates that in some weeks (including the week of
21 June 16, 2015), considering the hours he was logged in to receive ride requests from Uber, and
22 after deducting the cost of his car and gas expenses, the amount he received for his work driving
23 for Uber came to less than the Massachusetts minimum wage of \$9.00 per hour." SAC at ¶ 30.
24 However, Plaintiffs provide no information for how this hourly amount was calculated and why

26 ² Indeed, the Court also notes that the *current* Uber terms and conditions for riders appears
27 to provide that Uber does not designate any portion of the payment as tip or gratuity, and that any
28 representation by Uber – whether on Uber's website, the app, or in any marketing materials – is
not intended to suggest that Uber provides any additional amount beyond those described to the
driver.

1 Morris's hours logged into the Uber app should be considered compensable time. Plaintiffs'
2 theory is unclear, *e.g.*, as to whether they contend that drivers are at "work" whenever the Uber
3 app is on.

4 Plaintiffs allege even less information with their overtime law claim, as Plaintiffs only
5 allege that Plaintiff Yucesoy and Plaintiff Morris "often worked more than 40 hours per week,"
6 but do not allege that during those weeks they did not receive overtime pay. SAC at ¶ 31.
7 Plaintiffs do not allege how the basic rate of pay is calculated or their precise theory of overtime.
8 At the hearing on this matter, Plaintiffs suggested that they are arguing that there is a *per se*
9 violation based solely on the failure to set a policy providing for overtime pay whenever an
10 individual works more than forty hours. If this is their theory, Plaintiffs are required to explain
11 their theory – and plead *specific* facts supporting their theory, including what qualifies as "work" –
12 in the complaint. Because Plaintiffs fail to allege and articulate its theories sufficient for Uber to
13 defend, these causes of actions are dismissed with leave to amend.

14 G. Independent Liability

15 1. Independent Contractor Misclassification

16 Plaintiffs allege that Defendants Kalanick and Graves can be held individually liable for
17 independent contractor misclassification. This claim is based on Massachusetts General Law
18 chapter 149, Sections 148 and 148B. In Section 148, the statute provides: "The president and
19 treasurer of a corporation and any officers or agents having the management of such corporation
20 shall be deemed to be the employers of the employees of the corporation within the meaning of
21 this section." Likewise, in Section 148B, the statute states: "the president and treasurer of a
22 corporation and any officer or agent having the management of the corporation or entity shall be
23 liable for violations of this section." As recognized by the courts, "an employer can include a
24 'president or treasurer' without any reference to that individual's interaction with employees."
25 *Blanco v. United Comb & Novelty Corp.*, Civil Action No. 13-10829-TSH, 2013 WL 5755482, at
26 *2 n.3. In other words, under these two sections, liability can be imposed solely based on an
27 individual's position, without any requirement that the individual direct policy related to
28 employment practices. *See Allen v. Intralearn Software Corp.*, 2006 Mass. App. Div. 71, 74

1 (2006).

2 Under a plain reading of the statute, Defendant Kalanick is liable because Plaintiffs allege
3 that he is the president of Uber, and thus falls within the ambit of “employer” as defined by these
4 two sections. At the hearing, Defendants argued that Defendant Kalanick is not the president of
5 Uber, but its CEO. Because Plaintiffs declined to stipulate to this, the Court will not at this
6 juncture dismiss the independent contractor misclassification claim against Defendant Kalanick.
7 However, if in their next amended complaint, Plaintiffs continue to assert liability against
8 Defendant Kalanick on the basis of his position as president of Uber, they are obligated by Rule
9 11 to conduct a reasonable inquiry in certifying that its contention is factually accurate.

10 As to Defendant Graves, he is alleged to be the vice president of Uber and therefore does
11 not qualify as a statutory employer under the plain terms of these sections. The Court also finds
12 that there are insufficient facts to show that Defendant Graves should be held liable as an officer
13 having the management of the corporation. Plaintiffs need to plead facts showing that Defendant
14 Graves controlled, directed, or participated to a substantial degree in formulating and determining
15 the policy of Uber. *See Wiedmann v. Bradford Grp., Inc.*, 444 Mass. 698, 711 (2005).
16 Conclusory allegations that Defendant Graves “has primary responsibility for overseeing the
17 management of service employees employed by Uber” are simply inadequate. While Plaintiffs
18 protest that these are “matters [that] fall squarely within the province of discovery,” and thus they
19 should not be required to plead more, the Court observes that Plaintiffs have already *deposed*
20 Defendant Graves on July 13, 2015 – prior to the filing of the Second Amended Complaint – in
21 connection with this case. Docket No. 121 at 3. Because Plaintiffs have had ample opportunity
22 but failed to plea with sufficient specificity, the Court will dismiss Defendant Graves from this
23 cause of action with prejudice.

24 2. Massachusetts Tips Law

25 Plaintiffs also seek to hold Defendants Kalanick and Graves individually liable for
26 violating the Massachusetts Tips Law. To the extent that Plaintiffs’ Tips Law claim against Uber
27 is currently inadequately pleaded, it is also inadequately pleaded against the individual defendants.
28 In addition, the Court finds that there are insufficient factual allegations to support individual

1 liability.

2 The Court previously dismissed the Tips Law claims as to the individual defendants
3 because neither Kalanick nor Graves fell into the Massachusetts Tips Law's definition of an
4 "employer," *i.e.*, "any person or entity having employees in its service, including an owner or
5 officer of an establishment employing wait staff employees, service employees, or service
6 bartenders, or any person whose primary responsibility is the management or supervision of wait
7 staff employees, service employees, or service bartenders." Mass. Gen. L. c. 149 § 152A(a).³
8 First, the Court found that there the complaint alleged that Plaintiffs were "in service" to Uber, not
9 the individual defendants. MTC Order at 16. Plaintiffs do not dispute this finding, and have not
10 otherwise pled that Plaintiffs are in service to the individual defendants in their Second Amended
11 Complaint.

12 Second, the Court held that neither individual defendant was an "owner or officer of an
13 *establishment* employing . . . service employees." *Id.* (quoting Mass. Gen. L. c. 149, § 152A(a)
14 (emphasis added)). Plaintiffs challenge the Court's reading of the term "establishment,"
15 contending that the Court narrowly construed the term to only include restaurants and bars. Opp.
16 at 23. Plaintiffs are mistaken. The Court gave the term "establishment" its plain and ordinary
17 meaning of a *place* of business, rather than reading it as inclusive of all corporations.⁴ MTC Order
18 at 16-17. This distinction is supported by the fact that the Massachusetts Legislature knew how to
19 impose individual liability more broadly on corporate officers, as demonstrated by Sections 148
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21 ³ This definition is narrower than that found in Sections 148 and 148B of the Wage Act,
22 which – as discussed above – includes as an employer the president and treasurer of a corporation,
23 without looking at their role in employment policy or company management. As the Court
24 previously found, the strict individual liability imposed by Sections 148 and 148B cannot be
imported to other statutory claims, even those brought under other sections of the Wage Act. *See*
Blanco, 2013 WL 5755482, at *2 n.3; MTD Order at 15.

25 ⁴ Plaintiffs' citation to the Massachusetts Attorney General's Advisory is not to the
contrary. *See* Opp., Exh. A. The Advisory explains that "service employees" are not limited to
26 those who work in the food or beverage industry. *Id.* at 2. However, this is a distinct issue from
whether the term "establishment" encompasses a place of business or all corporations. The
27 Advisory does not dispense with the "establishment" requirement of the statute. Plaintiffs' cases
are also inapposite, as notably none seek to impose liability upon the individual officers of the
28 hotel or airline corporation. *E.g.*, *Bednark v. Catania Hospitality Grp., Inc.*, 78 Mass. App. Ct.
806 (2011); *DiFiore v. American Airlines, Inc.*, 454 Mass. 486 (2009).

1 and 148B of the Wage Act, but chose not to. Because Plaintiffs again do not demonstrate that the
2 individual defendants are officers of an establishment, they cannot be held individually liable
3 under this part of the employer definition.

4 Finally, the Court found that “the operative complaint contains no allegations that either
5 Kalanick or Graves have ‘primary responsibility’ for the ‘management or supervision of wait staff
6 employees, service employees, or service bartenders.’” MTD Order at 17 (quoting Mass. G.L. c.
7 149, § 152A(a)). In the Second Amended Complaint, Plaintiff adds a few conclusory allegations
8 that “[a]s the top official for Uber, Mr. Kalanick has primary responsibility for *overseeing* the
9 management of service employees employed by Uber, namely Uber drivers” and that “[a]s a
10 senior official for Uber, Mr. Graves also has primary responsibility for *overseeing* the
11 management of service employees employed by Uber, namely Uber drivers.” SAC at ¶¶ 12, 13
12 (emphasis added). But general allegations of oversight rather than management of service
13 employees are insufficient to satisfy federal pleading standards. *See* MTD Order at 14; *O'Connor*,
14 2013 WL 6354534, at *18. Count 2 is dismissed against the individual defendants with prejudice.

15 **III. CONCLUSION**

16 With the exception of the *quantum meruit* claims against Uber and the independent
17 contractor misclassification claim against Defendant Kalanick, all of Plaintiffs’ remaining
18 challenged claims are insufficiently pleaded. Except as to the claims against the individual
19 Defendants dismissed herein with prejudice, Plaintiffs are granted leave to amend, and any
20 amended complaint should be filed within 21 days from the date of this Order. No further
21 amendments shall be allowed.

22 This order disposes of Docket No. 109.

23 **IT IS SO ORDERED.**

25 Dated: November 10, 2015



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EDWARD M. CHEN
United States District Judge